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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, *et al.*,

Petitioners,

v.

JOSEPH P. MOODY, *et al.*,

Respondents.

No. 74-428

HALIFAX LOCAL NO. 25, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

Petitioner,

v.

JOSEPH P. MOODY, *et al.*,

Respondents.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Joseph P. Moody, et al., file this single brief in opposition to the Petitions for a Writ of Certiorari filed by Albemarle Paper Company, et al., in No. 74-389 and by Halifax Local No. 25, United Papermakers and Paperworkers, AFL-CIO in No. 74-428.

Questions Presented

The issues in Nos. 74-389 and 74-428 arising from the grant of class-wide back pay are:

1. Whether, in determining whether to award compensatory back pay, a private employer's voluntary practices of racial discrimination should be treated like those mandated by state "protective" statutes which some courts have decided justify withholding back pay in sex discrimination cases? (Nos. 74-389 and 74-428)

2. Whether the district courts, in the exercise of their discretion to award back pay, should be free of appellate guidelines effectuating the statutory purpose of according full relief to victims of employment discrimination? (Nos. 74-389 and 74-428)

3. Whether the Court of Appeals erroneously decided that no "special circumstances" justify denial of back pay in this case? (No. 74-389)

4. Whether a class back pay award is incompatible with Rule 23, Federal Rules of Civil Procedure, or the Congressional purpose of Title VII? (Nos. 74-389 and 74-428)

The issues in No. 74-389 arising from the injunction against the testing program are:

5. Whether the EEOC Guidelines embody standards which may be considered in evaluating an employer's attempt to validate its discriminatory employment aptitude tests?

6. Whether an employer may continue to utilize unlawful employment aptitude tests while making further attempts to justify the tests?

Statement of the Case

Petitioner Albemarle's statement of the proceedings below (Co. Pet. 3-4, 6-7)[1] is generally accurate. In stating the facts, however, both Petitioners neglect to mention that Respondents and their class of black employees suffered severe loss of income as a result of Petitioners' continuing practices of systemic employment discrimination. The Petitions raise issues related to two distinct aspects of those discriminatory policies: seniority and promotional practices, and written aptitude testing.

1. Seniority and Promotional Practices.

Petitioners kept all jobs and departments strictly segregated until 1964 under an express policy of discrimination (Co. Pet. App. 7-12). Segregated "extra boards" assured that the racial staffing of lines of progression would be breached neither by regular promotions nor by employee recalls (Co. Pet. App. 12-13). The district court found that Petitioners had "intentionally" perpetuated this overtly discriminatory system after 1965, by means of an unlawful job seniority system (Co. Pet. App. 22-24). Neither Petitioner took an appeal from this obviously correct finding although Albemarle's Petition now implies (the record notwithstanding) that judicial intervention was only the handmaiden to a benevolent employer's voluntary reform (Co. Pet. 5).[2]

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[1] Citations in the form of "Co. Pet." are to the Petition filed by Albemarle Paper Company in No. 74-389. Citations to "U. Pet." are to the Petition of Halifax Local No. 25, the Union, in No. 74-428. The respective Petitioners are sometimes referred to as "Albemarle" or the "Company" and the "Union" hereinafter.

[2] Albemarle's assertion that the 1968 contract adopted "plant seniority" is erroneous. In fact that contract only allowed carryover of job seniority into the lowest job of the transferee's new

The district court found that this unlawful seniority system limited black workers to the lower-paying departments and, within "integrated" departments, to the lower-paying jobs (Co. Pet. App. 7-13). As of June 30, 1967 there was an average pay differential between white and black workers of approximately $0.55 per hour or $1,144.00 per average work year; in excess of 200 white workers earned a wage a quarter per hour or more above the highest black wage at the mill.

2. Testing and the Validation Study.

At all times since 1963, Albemarle has required satisfactory scores on two "paper and pencil" tests as a prerequisite to hiring or transfer into most of the more desirable and lucrative, *i.e.* all-white, jobs (Co. Pet. App. 13-14). These tests, which included the Wonderlic (declared unlawful in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)), disproportionately screened out black employees (Co. Pet. App. 38). Albemarle used its tests in precisely the same manner condemned by *Griggs*.[3] This case differs from *Griggs* only in that here the Company made a belated effort to justify its testing under the *Griggs* rule.

Albemarle made no effort to study whether its test usage (begun in 1963) was job-related, until several months before trial (Co. Pet. 5). Then it hired an expert who per-

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line of progression; it did *not* allow for subsequent use of plant seniority in competing for promotions up the line (Co. Pet. App. 6). Moreover, the contract gave no one a right to transfer, but rather left transfer requests within the Company's sole discretion (*id.*). Petitioners did not completely eliminate the unlawful features of their contract until over six years after Title VII became effective, when they were enjoined to do so by the district court.

[3] That is, blacks were required to pass the tests to gain access to white jobs after 1965, even though many white incumbents had not had to take or pass the tests in order to get or keep the same jobs (Co. Pet. App. 15).

formed a hurried validation study riddled with manifest deficiencies which violated EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1 *et seq.* (see Co. Pet. App. 36-43). Based on this study, the expert recommended that the tests were valid for *some* jobs for which Albemarle had required them (Co. Pet. App. 38). Albemarle, however, continued to require tests in *all* instances, using them and relying on them for its legal defense, to screen applicants for many jobs for which there was *no* evidence of job-relatedness because no study had been performed, or for which the study demonstrated no significant degree of job-relatedness (*id.*).[4]

ARGUMENT

I.

This Court Should Not Review the Back Pay Award.

A. *There Is No Significant Conflict Among the Circuits as to the Propriety of Class Back Pay in Title VII Cases.*

Petitioners' arguments about a conflict of Circuits on class back pay awards in Title VII cases overlooks the fact that the Courts of Appeals have developed two well-established, consistent lines of cases.

The first line arises from cases in which a private employer and/or union voluntarily commit unlawful employment discrimination *not* required by any state law. Such cases typically involve racially restrictive seniority, promotion, or transfer systems, non-job-related testing practices, or unjustifiable educational requirements, which

[4] The same expert also studied the job-relatedness of Albemarle's high school education requirement and concluded that it was valid (Co. Pet. App. 19-20). The district court rejected his conclusion and held the requirement unlawful (*id.* 24); Albemarle did not appeal this finding.

inflict economic injury on members of the class. See, *e.g.*, *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1972); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), *cert. filed* October 15, 1974, No. 74-424; *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. filed* September 28, 1974, No. 74-351; *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Bowe* v. *Colgate-Palmolive Co.*, 489 F.2d 496 (7th Cir. 1973), following 416 F.2d 711 (7th Cir. 1969). The case at bar closely resembles these cases on its facts and in the decision of the Court of Appeals.[5]

The cases that Petitioners rely on, denying back pay—*Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240 (3rd Cir. 1973); *Manning* v. *International Union*, 466 F.2d 812 (6th Cir. 1972), *cert. denied* 410 U.S. 946 (1973); and *Schaeffer* v. *Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972)—are from a second, easily distinguishable mold. Each involved an employer practice limiting women's employment opportunities in obedience to mandatory state female protective statutes. In each,[6] the employer faced a dilemma created by conflicting state and federal regulatory statutes. In this line, the Courts of Appeals hold that back pay should not be awarded where the employer's practice was required by state legislation presumptively valid until declared illegal under Title VII.

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[5] Indeed, the Fifth Circuit in *Johnson* and *Pettway* and the Sixth Circuit in *Head* approve and adopt the decision of the Fourth Circuit in this case. That decision, in turn, approves and relies on *Robinson* and *Bowe*.

[6] See also, *LeBlanc* v. *Southern Tel. & Tel. Co.*, 333 F. Supp. 602 (E.D. La. 1971), *aff'd per curiam* 460 F.2d 1228 (5th Cir. 1972), *cert. denied* 409 U.S. 990 (1972); *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971).

Kober v. *Westinghouse Electric Corp., supra,* follows the same reasoning. There the Third Circuit rests its opinion squarely on the logic of *Manning, Schaeffer,* and *LeBlanc,* see 480 F.2d at 247-248.[7]

Here, Petitioners' discrimination was not required by law but, on the contrary, violated all applicable statutes.[8] There is no conflict among the Circuits on back pay on the facts of this case.

B. *The Court of Appeals Opinion States an Appropriate Standard for the Exercise of Discretion to Award Back Pay.*

Both Petitioners direct their attack more to the standard announced by the Court of Appeals—

> a plaintiff or a complainig class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust [Co. Pet. App. 46-47]

—than to the result in this case. But the Union Petitioner's Statement (and its statement of the Question Presented)

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[7] *Kober,* notwithstanding its reference to Judge Boreman's dissent as noted by Petitioners, 480 F.2d at 247, in no way conflicts with the holding in this case. The *Kober* holding can be read at most to require that a district judge not be deprived of discretion to deny back pay in the circumstances of the state protective law cases. The Fourth Circuit's opinion in this action allows for and contemplates the *Kober* result, see Co. Pet. App. 47 n.5.

[8] Faced with the same argument made by Petitioners here, the Fifth Circuit wrote in *Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F.2d at 1377,

> "Goodyear has failed to disclose to us any Texas laws which required the invidious employment discrimination revealed here. The reason for this efficacious omission is manifest; no similar "protective" legislation based on racial grounds has ever been enacted in Texas. Such an argument falls of its own weight."

seriously mischaracterizes the holding below. Contrary to the Union's assertions, the opinion does not "preclude the trial court, in this and future cases, from exercising *any* degree of discretion" in back pay cases (U. Pet. 8, emphasis added); it does not "predetermine all present and potential suits . . . within the aegis of the Fourth Circuit" (*id.* 9); nor does it state an "inflexible position" (*id.* 9) or a "hard and fast rule" of "mandatory back pay" (*id.* 10). Rather, the Fourth Circuit has done no more or less than decide a case and state its rationale, which will have appropriate precedential effect.

One of the most important functions of an appellate court is to maintain consistency of decisions within its Circuit, *cf. Moody* v. *Albemarle Paper Co.*, 41 L.Ed.2d 358, 362 (1974). The Fourth Circuit's articulation of a standard for district courts' exercise of discretion for awarding back pay, an issue frequently litigated in the Circuit, promotes and is essential to consistency.[9]

A standard ensuring the exercise of discretion in conformity with statutory purposes is proper and necessary to assure that discretionary powers are correctly utilized. As this Court has held,

> When [discretion is] invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law.

Langnes v. *Green*, 282 U.S. 531, 541 (1931). See also, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944) (exercise of dis-

[9] This standard is not an "advisory opinion" (*cf.* U. Pet. 11), since it was reached and applied in hotly contested litigation of immediate importance to the parties; rather it states a rationale for the court's holding in the case.

cretion must further legislative objectives)[10]; *United States* v. *Georgia Power Co.*, 474 F.2d 906, 921 (5th Cir. 1974); *Franks* v. *Bowman Transportation Co., supra*, 495 F.2d at 421.

In order to effectuate the statutory purposes of Title VII, the Fourth Circuit's standard carefully delineates limitations on a district court's discretion based on the "special circumstances" test (Co. Pet. App. 45-47). In some "special circumstances" a denial of back pay will be appropriate. Footnote 5 of the opinion (Co. Pet. App. 47) indicates at least one such circumstance, where conflicting mandatory state legislation is present (*cf.* pp. 5-7, *supra*).[11] The same standard has been adopted by the Fifth, Sixth, and Seventh Circuits.[12] *Cf. Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292, 296 (1960).

Petitioners urge that this Court allow district courts to exercise an essentially standardless and unfettered discretion. Their position that "discretion" allows different district judges to read the basic remedial provision of Title VII (Section 706(g), 42 U.S.C. § 2000e-5(g)) in fundamentally different ways invites arbitrary or willful decisions, *cf. Langnes* v. *Green, supra*. This result would

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[10] *Accord: Schultz* v. *Parke*, 413 F.2d 1364 (5th Cir. 1964); *Wirtz* v. *B. B. Saxon Co.*, 365 F.2d 457 (5th Cir. 1966).

[11] Subsequently, the Fourth Circuit has affirmed another district court's denial of back pay based on different "special circumstances," *Roberts* v. *Hermitage Cotton Mills, Inc.*, 498 F.2d 1397 (4th Cir. 1974), *aff'g* 8 EPD ¶ 9589 (D.S.C. 1973). Moreover, back pay will be limited to compensation for actual losses, as in *Lea* v. *Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971) (Co. Pet. App. 47).

[12] See, *e.g.*, *Johnson* v. *Goodyear Tire & Rubber Co., supra*, 491 F.2d at 1375; *Pettway* v. *American Cast Iron Pipe Co., supra*, 494 F.2d at 252-253; *Head* v. *Timken Roller Bearing Co., supra*, 486 F.2d at 876; *Bowe* v. *Colgate-Palmolive Co., supra*, 416 F.2d at 719-720.

be at odds with the thrust of Title VII as remedial legislation of national scope.

The legislative history of Section 706(g) demonstrates the purpose for which Congress confided discretion to the district courts:

> The provisions of this subsection are intended to give the courts *wide discretion* exercising their equitable powers *to fashion the most complete relief possible.* In dealing with the present section 706(g) the courts have stressed that *the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole,* and that the attainment of this objective rests not only upon the elimination of the particular unlawful practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. [emphasis added]

Conference Committee of the House and Senate, Section-by-Section Analysis of H.R. 1746, reprinted by Subcommittee on Labor of the Senate Committee on Labor and Public Welfare in *Legislative History of the Equal Employment Opportunity Act of 1972* (1972), pp. 1844, 1848.

The Court of Appeals correctly applied the "special circumstances" test.

C. *The Court of Appeals Properly Rejected the Trial Court's Findings of Special Circumstances.*

Without fully or accurately setting out what facts and principles the courts below relied on, Petitioner Albemarle attacks the Court of Appeals' failure to excuse it from liability because of purported "special circumstances" (Co.

Pet. 9-11). Those facts and principles show that the Petition raises no significant issue of whether "special circumstances" were present here.

Albemarle incorrectly asserts that the Fourth Circuit held the question of Petitioners' good faith "*totally irrelevant* to the question of back pay" (Co. Pet. 9, emphasis supplied). The Court of Appeals made no such holding; the Court simply ruled that the district court erred in denying back pay because it had found no "bad-faith" Title VII violations by Petitioners (Co. Pet. App. 43-46). The Court of Appeals decision is consistent with this Court's pronouncement on "intent" in *Griggs* v. *Duke, Power Co., supra.*[13] Appellate courts have uniformly held that "good faith" imposes no bar to a back pay award.[14]

Similarly, Albemarle misstates the issue in contending that a "tardy" assertion of Respondents' back pay claim "prejudiced" Petitioner (Co. Pet. 10). In fact Petitioner

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[13] [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." 401 U.S. at 432.

[14] See, *e.g.*, *Robinson* v. *Lorillard Corp., supra,* 444 F.2d at 804; *Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F.2d at 1376; *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F.2d at 253; *Baxter* v. *Savannah Sugar Refining Corp., supra,* 495 at F.2d 443; *Carey* v. *Greyhound Bus Co., Inc.,* 500 F.2d 1372, 1378-79 (5th Cir. 1974); *Head* v. *Timken Roller Bearing Co., supra,* 486 F.2d at 876; *Waters* v. *Wisconsin Steel Works of Int'l Harvester Co.,* —— F.2d ——, 8 EPD ¶9658 (7th Cir. 1974) at pp. 5787-88.

The two Eighth Circuit cases cited by Albemarle—*United States* v. *St. Louis-San Francisco Ry.*, 464 F.2d 301 (1972), *cert. denied* 409 U.S. 1116 (1973); and *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354 (1973)—do not turn on the effect of good faith or its absence, but on the proof of causal relationship between discrimination and economic injury and on the effect of notice of changes in the law.

had express notice that Respondents sought back pay over one year before the start of trial. Moreover, as the Fourth Circuit noted, the defenses to back pay in this case are the same as the general defenses to the claim for injunctive relief (Co. Pet. App. 44).[15] Nevertheless, Albemarle relies on a memorandum filed early in the case in which Respondents stated that they sought no "money damages . . . for any member of the class *not before the court*" (Co. Pet. 10 n.10) (emphasis supplied). Before the trial, the district court entered an order on Albemarle's motion requiring non-plaintiff back pay claimants to file individual claim forms.[16] Nearly one hundred persons (the majority of the class) filed such claims which were, therefore, individually "before the court" at trial. Petitioners were not prejudiced by the assertion of the class back pay claim below.[17]

Albemarle argues further that back pay should be denied because the Company might not have dragged out this litigation for so long, had it had specific notice that its unlawful discrimination would prove so costly (Co. Pet. 10). This plea is hardly cognizable in a court of equity sitting in a Title VII case. The enactment of Title VII was suf-

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[15] This ruling is in accord with rulings of the Third, Fourth, and Fifth Circuits in cases where the back pay claim, although not even raised until after trial, was allowed. *Rosen* v. *Public Service Gas & Electric Co.*, 409 F.2d 775, 780 n.20 (3rd Cir. 1973); *Robinson* v. *Lorillard Corp., supra*, 444 F.2d at 803; and *United States* v. *Hayes International Corp.*, 456 F.2d 112, 121 (5th Cir. 1972).

[16] Orders entered June 15, 1971 and July 8, 1971.

[17] Albemarle also argued below that the early disclaimer should now bar the back pay remedy, but the district court refused to rely on this ground, and the Court of Appeals rejected it. A similar disclaimer was no bar to back pay in *Robinson* v. *Lorillard Corp., supra*.

ficient legal notice to discriminatory employers, see *Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F.2d at 1377.

Moreover, the district court has not yet determined how much back pay particular class members are due; that is its assigned task on remand. Whether or not, or to what extent, potential liability would be affected by the equitable factors Albemarle asserts as "special circumstances" cannot be determined at this stage.

D. *Class Back Pay Is Compatible With Rule 23 and the Congressional Purpose Expressed in Title VII.*

Both Petitioners argue that as a general proposition class back pay cannot be awarded consistent with the provisions of Rule 23, Federal Rules of Civil Procedure, and the Congressional intent underlying Title VII. (See Co. Pet. 11, U. Pet. 12-13.) These same arguments have been uniformly rejected by the Circuits, at least six of which now recognize the availability of class back pay, see nn. 14, 15, *supra.*

Albemarle opines that a Rule 23 proceeding is "inherently" inappropriate for a Title VII back pay case (Co. Pet. 11). But the Advisory Committee's Notes, 39 F.R.D. 69, 102 (1966), specifically state that the authors of amended Rule 23 contemplated its use for civil rights cases. See *Robinson* v. *Lorillard Corp., supra,* 444 F.2d at 801-802. Petitioners' theory that *each* class member should be required to process his individual EEOC charge and thereby qualify as a named plaintiff blinks at the whole purpose of the Rule 23 amendments permitting like claims to be joined.[18]

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[18] In the leading case of *Oatis* v. *Crown-Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968), the Court held:

> Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges

Finally, the Fourth Circuit's standard does not conflict with the Congressional policy favoring an opportunity for conciliation (cf. Co. Pet. 11, U. Pet. 12-13). That policy is well served by the requirement that a Title VII class action may only be maintained after exhaustion of administrative remedies before the EEOC upon a charge "like or related to" the subject matter of the suit. See, *e.g.*, *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1971); *Miller* v. *International Paper Co.*, 408 F.2d 283, 290-291 (5th Cir. 1969). Once such a charge has been filed, giving EEOC and respondents an opportunity to conciliate the allegations of discrimination, further EEOC charges from other class members would be superfluous, *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, 494 F.2d at 256; and they may, without filing redundant administrative charges, join in the class representative's lawsuit, *Oatis* v. *Crown-Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968); *Bowe* v. *Colgate Palmolive Co.*, *supra*, 416 F.2d at 720. The contrary rule urged by Petitioners would frustrate the goal of providing meaningful conciliation opportunities. It would allow a discriminatory employer or union to evade charges of class-wide or systemic discrimination with impunity and to confront only the individual claims of the person who files the EEOC charge. Such a result would be squarely contrary to Congress' basic purpose in enacting Title VII.

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before the EEOC, filed against the same employer, as a prerequisite to relief through resort to the court would frustrate our system of justice and order.

Accord: Bowe v. *Colgate-Palmolive Co.*, *supra*, 416 F.2d at 720.

II.

This Court Should Not Review the Testing Decision.

A. *The Court of Appeals Correctly Considered the EEOC Guidelines in Evaluating and Rejecting Albemarle's Validation Study.*

The decision below is consistent with the holding and spirit of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), which requires that Title VII courts prohibit use of discriminatory tests not shown to measure an employee's ability to succeed on the job. The facts are strikingly similar to those of *Griggs;* Albemarle attempts to distinguish itself from Duke Power solely on the basis of its belated validation study.

The Court of Appeals did not reject that study by requiring "detailed and rigid compliance" with the EEOC Guidelines on Employee Selection Procedures, as Albemarle claims (Co. Pet. 13). Rather, it criticized the expert's validation methods for severe inadequacies that render his conclusions unreliable and insufficient as proof of a "manifest relationship" between test success and job performance (see Co. Pet. App. 37-43).[19]

The majority opinion carefully analyzed the validation study's defects and evaluated the propriety of applying the EEOC Guidelines standards. The opinion's common-sense analysis supports its legal conclusion that, as illustrated by the facts here, the Guidelines do generally set out appro-

[19] Even if the study were held to have proved what it purports to show—limited and partial test validity—it would not justify the Company's overbroad test usage, see p. 5, *supra*. Albemarle's testing is thus "unvalidated" in the same sense as Duke Power's.

priate standards for this case (Co. Pet. App. 38-42).[20] This is far from the slavish adherence to dry technicalities with which Albermarle charges the court below.

B. *The Court of Appeals Properly Ordered That Albemarle Be Enjoined From Using Unvalidated Discriminatory Tests.*

The court below acted properly in directing the district court to enjoin the testing program. Since Albemarle's defense failed to prove the tests job-related, *Griggs* forbids their current use. Nothing in the Court of Appeals opinion or the EEOC Guidelines would prevent the Company from utilizing a testing program *after* it had been properly shown to be "manifestly job related." Yet Petitioner seeks an individual exemption from the rule of *Griggs:* it seeks leave to use tests detrimental to black employees *before* proving them valid. Indeed, Albemarle's argument is little more than a request for license to delay compliance with Title VII for a few more years.[21] Not only does the Company urge that black employees be made to wait patiently for equal job opportunities while it

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[20] Moreover, those Guidelines are reasonable and reflect a general professional consensus, as numerous appellate courts have noted in following *Griggs*' suggestion that the courts accord great deference to the Guidelines. See, *e.g., United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 456 (5th Cir. 1971), *cert. denied* 406 U.S. 906 (1972); *United States* v. *Georgia Power Co.*, 474 F.2d 906, 913 (5th Cir. 1973); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 221 (5th Cir. 1974). *Cf. Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333, 1337 n.6 (1973); *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387, 394 n.8 (2nd Cir. 1974); *Carter* v. *Gallagher*, 452 F.2d 315, 320, 326, *adopted in relevant part*, 452 F.2d 327 (8th Cir. 1971) (en banc), *cert. denied* 406 U.S. 950 (1972).

[21] Since the mandate below was stayed, the Company presumably continues to apply its tests, ten years after Title VII made them unlawful and nearly four years after the *Griggs* decision.

litigates interminably in defense of its discredited tests; Albemarle boldly asserts that by refusing its proposal the Fourth Circuit abused its *remedial* discretion (Co. Pet. 14-15).

The order and burden of proof established for the testing issue in *Griggs* would be subverted by adoption of Albemarle's argument. Respondents have made out their case for relief under *Griggs* by proving that the tests have an adverse impact on black employees. Albemarle cannot ask plaintiffs, who have met their initial burden, to stand patiently by as laborers while their employer seeks "ultimately" to meet its burden (Co. Pet. 14).

CONCLUSION

The Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

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